

1 **UNITED STATES DISTRICT COURT**
2 **EASTERN DISTRICT OF NEW YORK**

3 **KENNETH HAIM, BRIAN COHEN, DAVID**
4 **CHANG, ARBEN PERKOLAJ AND SEJIN**
5 **KIM**

6 **Plaintiffs**

7 **-against-**

8 **AMR CORPORATION/AMERICAN**
9 **AIRLINES INC.**

10 **Defendants**

11 **Motion to Remand and for Costs**

12 **On Grounds of Defective Removal and Lack of Federal Question and Diversity**
13 **[Under 28 U.S.C. §1447(c)]**

- 14 1. Plaintiffs originally filed their claim in the Civil Court of the City of New York
15 County of Kings ("Civil Court.") on April 7, 2010 and were assigned Docket No.
16 034136 in the above named action. Plaintiffs served the Summons and Complaint
17 for Civil Court Docket No. 034136 on Defendants on May 14, 2010. Defendants
18 purportedly filed Notice of Removal to the United States District Court Eastern
19 District of New York ("E.D.N.Y.") on June 2, 2010. Defendants' Notice of
20 Removal to E.D.N.Y. is defective because the amount in controversy does meet the
21 threshold necessary to maintain Diversity Jurisdiction under 28 U.S.C § 1332 and
22 because Plaintiffs' claims do not raise a Federal Question under 28 U.S.C. §1331.

23 **E.D.N.Y. HAS NO DIVERSITY JURISDICTION OVER THIS MATTER**

24 **A. Plaintiffs' separate compensatory damages claims do not meet or exceed \$75,000**
25 **each and cannot be aggregated.**
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1 2. Defendants state, in paragraphs 5 and 6, of Defendants' Notice of Removal that the
2 damages sought exceed jurisdictional limitations of all lower Courts in the State of
3 New York and that Defendants believe that the amount in controversy exceeds the
4 sum of seventy five thousand dollars. Both of the Defendants' beliefs are incorrect.

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6 3. Plaintiffs' claims consist of at least 5 distinct claims for compensatory damages.
7 Plaintiffs indicate, in paragraph 13 of Plaintiffs' complaint, that each Plaintiff
8 demands a specific amount of compensatory damages and that no single Plaintiff's
9 compensatory damages meet or exceed \$75,000. In fact, none of Plaintiffs'
10 individual compensatory damages claims surpass \$2,000. Each Plaintiff has a
11 separate claim against Defendants and no claim meets or exceeds the \$75,000
12 threshold. Further, because each Plaintiff's complaint and damage amount is
13 separate, these claims are not part of a common fund and therefore cannot be
14 aggregated to attempt to meet the \$75,000. *See Pinel v. Pinel*, 240 U.S. 594 (U.S.
15 1916)

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17 **B. Plaintiffs' Claims for punitive damages cannot be aggregated to meet the \$75,000**
18 **threshold.**

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20 4. Each Plaintiff requests a punitive damage award of \$23,000 for Defendants' willful
21 actions in this matter. The sum of each Plaintiff's compensatory and punitive
22 damage amount to less than \$25,000 for each Plaintiff, well below the amount in
23 controversy threshold. The court, in *Gilman v. BHC Secs.*, 104 F.3d 1418, ruled that
24 punitive damages associated with each Plaintiff's separate claims are similarly
25 separate and not subject to aggregation for the purpose of meeting the amount in
26 controversy threshold. Plaintiffs' punitive damage demands can not be aggregated to
27 meet the \$75,000 diversity threshold because Plaintiff's underlying claims for
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1 compensatory damages are separate and not part of a common fund.

2
3 **C. Defendants' maintain a nerve center in New York State**
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5 5. While it is clear that the amount in controversy has not been met, Plaintiffs also
6 dispute Defendants' claim, in paragraph 3 of Defendants' Notice of Removal, that
7 Defendants are Citizens of the States of Texas and Delaware, and by implication, not
8 Citizens of the State of New York. Upon Plaintiff's information and belief,
9 Defendants maintain transportation hubs at both major New York City airports, John
10 F. Kennedy and La Guardia, and maintain several offices in and around New York
11 City. Further American Airlines sends regular marketing emails which are received
12 inside the State of New York.

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14 6. Based on the above, Plaintiffs' request that this matter be remanded to Civil Court
15 for lack of Diversity Jurisdiction.
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17 **THE FACTS OF THIS MATTER DO NOT RAISE A FEDERAL QUESTION**
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19 7. Contrary to paragraphs 7, 9 and 10 of Defendants' Notice of Removal, Plaintiffs'
20 allegations are not governed by the Montreal Convention. In *Weiss v. El Al Isr.*
21 *Airlines, Ltd.*, 433 F. Supp. 2d 361, at 365, the court explained that "the Montreal
22 Convention, like the Warsaw Convention, provides strict carrier liability for the
23 following three categories of damages arising out of the international carriage of
24 passengers or goods by airlines. Article 17 provides for carrier liability for the death
25 or bodily injury of a passenger or the destruction, loss of or damage to her baggage,
26 provided that the harm occurred onboard the aircraft or in the process of embarking
27 or disembarking. Article 18 provides for damage to cargo sustained during carriage
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1 by air, subject to certain exclusions. Finally, Article 19 provides for carrier liability
2 occasioned by delay in the carriage of passengers, baggage or cargo unless the
3 carrier can prove that it and its servants and agents took all measures that could
4 reasonably be required to avoid the damage or that it was impossible for it or them to
5 take such measures." (*quotations removed*) The facts of this matter do not meet any
6 of the criteria listed by the Weiss court and quoted above. Therefore the Montreal
7 Convention does not apply to Plaintiffs' claims.

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- 9 8. In *Mullaney v. Delta Air Lines, Inc.*, 2009 U.S. Dist. LEXIS 51039, the United States
10 District Court Southern District of New York ("S.D.N.Y") stated that an Airline
11 Defendant's failure to perform its obligation to provide carriage in exchange for
12 money is non-performance. The Mullaney Court also stated that "Claims for non-
13 performance are not preempted by Article 19 of the Convention." *Id* at 5.
- 14
- 15 9. Plaintiffs' claims do not relate to delay or carriage, rather Plaintiff's claims are for
16 non-performance of contract, breach of contract, negligence and Defendants' willful
17 violation of American Airlines' policy. Defendants did not perform their part of
18 Defendants' agreements with Plaintiffs to return Plaintiffs from Belize to the United
19 States. Therefore, neither the Plaintiffs' claims nor the facts of this matter support
20 preemption by the Montreal Convention. This matter may be adjudicated in the
21 Civil Court of the City of New York under state and local law.
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- 23 10. Based on the above, Plaintiffs request that United States District Court Eastern
24 District of New York Docket Number 10 CV 2499 be remanded to the Civil Court of
25 the City of New York. Pursuant to rule 28 USC 1447 (c), Plaintiffs request that the
26 Court order Defendants to pay costs and attorney fees associated with the removal.
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2
3 Respectfully Submitted

4  7/1/2010
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10 CC: AMR Corporation/American Airlines Inc.

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